INTERIOR BOARD OF INDIAN APPEALS

Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, Bureau of Indian Affairs

18 IBIA 307 (05/31/1990)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

AUBERTIN LOGGING & LUMBER ENTERPRISES
v.
ACTING PORTLAND AREA, DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-17-A Decided May 31, 1990

Appeal from a denial of a loan guaranty.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

   Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Financial Matters: Financial Assistance

   Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

APPEARANCES: Douglas R. Aubertin, General Manager, for appellant; Wilford G. Bowker, Portland Assistant Area Director (Program Services), for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Aubertin Logging & Lumber Enterprises seeks review of a September 22, 1989, decision of the Acting Portland Area Director, Bureau of Indian Affairs (BIA; appellee), denying its request for a loan guaranty.

For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this matter to appellee for further consideration.

Background

On August 23, 1989, The Wheatland Bank (bank), Wilbur, Washington, filed with the Superintendent, Colville Agency, BIA, an application for loan guaranty on behalf of appellant. Appellant is a partnership between Richard J. Aubertin, an enrolled member of the Colville Confederated Tribes, and his son, Douglas R. Aubertin. The bank requested that BIA guarantee 80 percent of a $500,000 loan, which would enable the consolidation of appellant's outstanding debt into one loan. The bank stated that the individual currently guarantying a large percentage of appellant's debt wanted to be released from that obligation because of health reasons. The bank further indicated that it would not continue to finance appellant without a guaranty because of appellant's poor debt to worth ratio.

By letter dated September 22, 1989, appellee denied the requested guaranty. Appellee stated that "the reason for denial is that this is entirely refinancing with no new funds being injected for expansion of the enterprise."

The Board received appellant's appeal from this decision on October 18, 1989. Both appellant and appellee filed briefs on appeal.

Discussion and Conclusions

[1] The Board has previously held that decisions concerning whether or not a particular request for a loan guaranty should be approved are committed to the discretion of BIA. In reviewing such decisions, it is not the Board's role to substitute its judgment for that of BIA. Instead, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. Robert Gauthier v. Portland Area Director, 18 IBIA 303 (1990); Home Respiratory Services, Inc. v. Muskogee Area Director, 18 IBIA 299 (1990); McCoy Industries, Inc. v. Eastern Area Director, 18 IBIA 234 (1990).

Appellant argues that its loan guaranty request should have been approved under 25 CFR 103.17(a), which provides: "Applications for loans to refinance indebtedness will be approved only if justified and required due to the applicant's financial position and if clearly to the advantage of the applicant." Appellant contends that it has been told it is severely overextended and needs to sell down. 1/ It further states that, inter alia, its private guarantor is still present and the loan guaranty would reduce its payments by $20,183 per year, allowing it to skip certain payments and

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1/ Appellant states that it does not want to follow this course because it would mean severely reducing the number of tribal members and/or reservation residents it is able to employ and would curtail its ability to produce logs at a consistently high level, thus reducing its deliveries to the Colville tribal lumber mill at Omak, Washington.

thereby build up a positive cash flow, eliminate a $7,500 annual fee to the private guarantor, and provide $44,000 over its existing debt for expansion and/or cash flow enhancement.

Appellee states at page 2 of his answer brief:

> The Bureau of Indian Affairs worked with the Wheatland Bank to determine if there was clearly an advantage to the Aubertins in approval of an 80 percent guaranty to the bank, as required by 25 CFR 103.17(a). We found that the Aubertins were current in their payments to the Wheatland Bank. That the requested guaranty would only be for refinancing, and no new funds would be made available to the Aubertins' business. As submitted, the BIA determined guaranty request was not clearly to the advantage of the Aubertins' business. The advantages instead were to the Wheatland Bank in providing it with a more favorable risk situation than it had upon the submittal of a request for the guaranty. In the Bureau's analysis of the proposed guaranty all the advantages were to the Wheatland Bank lowering its risk factor on refinancing of loans previously advanced to the Aubertins' business. In this circumstance the guaranty may not be approved under applicable Federal law. See 25 CFR § 103.17(b). [2/] Accordingly, the Portland Area Director exercised his discretion and disapproved the Wheatland Bank's request for an 80 percent guaranty in the refinancing of the Aubertins' previous loans.

[2] In Gauthier, supra, 18 IBIA at 305-06, the Board held that it was improper to base a decision in a case arising under the Indian Financing Act programs on the applicant's failure to provide information that was never requested. Accordingly, it held that if BIA issues a decision denying assistance under these programs and the record shows that the decision was based on the lack of information that was not requested either on the standard form or as a supplemental submission, the decision is not supported by the record, and the Board will allow the applicant to submit on appeal information relating to the basis of BIA's decision.

The information which appellant submitted in this case strongly suggests that appellee did not base his decision on full and accurate information. For example, appellee's filings appear to indicate a belief that appellant's private guarantor had withdrawn, rather than merely indicating a desire to withdraw, as appellant alleges is the case. Furthermore, appellant contends that the refinancing would inure to its immediate financial advantage, instead of merely to the advantage of the bank as alleged by

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2/ Section 103.17(b) states:

"Applications for refinancing loans not guaranteed or insured under this Part 103 will not be approved for guaranty or insurance if, in the opinion of the Commissioner, the submittal of the application is motivated primarily to obtain guaranty or insurance of a loan which otherwise would be made."

appellee. Because the answers to the questions raised by appellee concerning appellant's application were not addressed in the information required by the application form and were not requested as a supplemental submission, appellee's decision is not supported by the record.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 22, 1989, decision of the Acting Portland Area Director is vacated and this matter is remanded to him for further consideration.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge